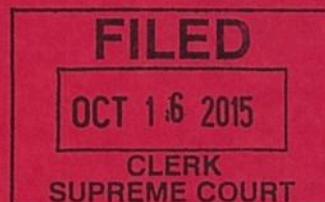


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2015-SC-000271-DE



REBEKAH MCCARTY

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT  
HON. BETH LEWIS MAZE  
CASE NO. 12-CI-00123

COURT OF APPEALS CASE NO. 2014-CA-000113

KENNETH FARIED

APPELLEE

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BRIEF OF APPELLANT  
REBEKAH MCCARTY

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Respectfully submitted,

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**CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)**

The undersigned certifies that a true and accurate copy of the BRIEF OF APPELLANT was served upon each of the following via U.S. mail, postage prepaid, this 16 day of October, 2015: i) M. Janice Lintner, Lynch, Cox, Gillman & Goodman, 500 West Jefferson Street, Suite 2100, Louisville, KY 40202; ii) Honorable Beth Lewis Maze, Judge, Bath Circuit Court, P. O. Box 1267, Mt. Sterling, KY 40353; iii) Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned further certifies that the record on appeal was not withdrawn after the Court of Appeals' opinion was issued.

  
*Counsel for Appellant*

## **INTRODUCTION**

This is a case involving an issue of first impression for the setting of initial child support when the parties have not established a lifestyle for the minor child by marriage or cohabitation and one party's income exceeds the maximum earning level in the guidelines.

## **STATEMENT CONCERNING ORAL ARGUMENT**

The issue of appropriate standards for setting child support for minor children when a joint standard of living has not been established by the parents and the income of one parent greatly exceeds the statutory guidelines, warranting a deviation from the guidelines, is of great importance. Counsel for Appellant believes that the existing case law is easily adapted to these circumstances with the proper evidentiary standard and for this reason, the Appellant does not believe oral argument is necessary.



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## STATEMENT OF THE CASE

Kyra, the child in this case, was born during the time that her parents were students at Morehead State University. Following the birth, Appellee, Rebekah McCarty (“Rebekah”) left school to care for the parties’ daughter, thereby allowing the child’s father to continue his education and to continue playing basketball at the college. Appellant, Kenneth Faried (“Kenneth”), completed his education, graduated and was recruited and signed by the Denver Nuggets as a professional ball player. (Video Record “VR” at 9:16:44). Kenneth’s starting salary beginning in 2011 was well over \$1,000,000 per year. (Id.)<sup>1</sup>

At the time Kyra was born in 2010 Rebekah had no financial resources and was living with her parents in Owingsville, Kentucky, where she and Kyra remained throughout the pendency of the underlying proceedings. In spite of his income level and access to funds, Kenneth did not make significant contribution to Kyra’s support until Rebekah filed a petition for custody and support in July of 2012<sup>2</sup> (VR at 9:26) and then only after the court entered a temporary order in November, 2012 prior to conducting a hearing. (Transcript of Record “TR” at p. 47).

The record reveals a lack of cooperation on Kenneth’s part and the difficulty Rebekah experienced in establishing his income level and lifestyle. Kenneth took from September 11, 2012 until January 8, 2013 to answer four interrogatories and four requests

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<sup>1</sup> At the time evidence was taken to set temporary support, Kenneth was earning \$1,342,380.00 annually in gross income and the available information did not take into account endorsements and other income he received. (TR at 23).

<sup>2</sup> Prior to submitting her petition Kenneth paid Rebekah \$500.00 per month in child support and \$90.00 per week for childcare costs. Until the petition was filed the minor child had health insurance coverage provided by the State and it was sometime after this litigation was underway that Kenneth provided health insurance coverage for Kyra.



for production of documents relating to his income and expenses. (TR at p. 94) At that point he objected on relevancy grounds to providing his monthly expenses and refused to provide any information relating to his expenditures. Eventually the Court was required to intervene so that the information relevant to determine Kenneth's available income and lifestyle, and the lifestyle which the child would have enjoyed had the parties not separated, was ultimately made available.

In the Order setting temporary support at \$2,000 per month,<sup>3</sup> the Court ruled that in the event a different amount was ultimately awarded after a final hearing when evidence could be presented, the final amount (regardless of whether the final amount was more or less than \$2,000 per month) would be effective as of the date Rebekah originally filed her motion for support. (TR at 47). The case was finally tried after significant delay necessitated by Kenneth's professional schedule.

Rebekah remained with extremely limited financial resources and testified at trial as to her and Kyra's actual monthly expenses consistent with her current income level and assistance of her family (VR at 9:24). As to the claim for support commensurate with the lifestyle the child might have expected had the parties married or cohabitated, she presented evidence of the child's needs with monthly anticipated costs since her minimal earnings would certainly not support the lifestyle the child would have enjoyed had the parties married or remained together. Rebekah's evidence consisted of anticipated costs for a comfortable and stable home in a safe neighborhood where the child would have her own bedroom and a place to play; utilities, phones and internet connection; safe and reliable transportation for the child; a reasonable budget for

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<sup>3</sup> Kenneth agrees that a deviation from the Guidelines was warranted based on his income level and no further argument is required as to that issue. (Appellant's Brief, p. 10)

healthful, varied and nutritious meals; routine medical, dental and vision care; appropriate clothing; cultural, educational and extracurricular opportunities; entertainment, gifts and simple luxuries; and an education planning and savings account which totaled \$5,000.00. (Petitioner's Trial Exhibit 3, Appendix at Tab 4, VR at 9:35, and 9:42).

Kenneth insisted that the measure for Kyra's needs and lifestyle should be the standard of living Rebekah was forced to maintain as a single parent with very minimal contribution from him, basing his claim on bank account statements provided by Rebekah in pretrial discovery showing what limited funds she was able to devote to the child's needs.

At the conclusion of all of the testimony the trial court made the appropriate determination under applicable case law and set child support at \$4,250.00 per month, retroactive to October 1, 2012 pursuant to KRS 403.160, with credit to Kenneth for the amounts paid under the temporary order in place until proof could be taken.<sup>4</sup>

Kenneth appealed. The Court of Appeals when faced with these competing contentions made the unsupportable statement that "a good barometer of Kyra's 'reasonable needs'" would be the amount of money that her mother was able to spend on her under these circumstances. (Opinion, p. 2, emphasis added) The appellate court also came to the erroneous conclusion that the principles announced in *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001) and *Cartwright v. Bell*, 277 S.W.3d 671 (Ky.App. 2009), applied to circumstances where the child's reasonable needs had previously been established, could be applied without alteration to situations in which no prior

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<sup>4</sup> Certain adjustments made by the court in response to a CR 59 motion filed by Appellant are not in dispute.

determination of reasonable needs had been made. (Opinion, p. 5). Because the Court of Appeals ignored the fact that a prior, jointly established lifestyle and standard of living were present in *Downing* and *Bell, supra*, the court actually misstated the issue of first impression – it is not simply the initial setting of child support when a deviation from the guidelines is warranted. Instead the issue which should be addressed concerns the factors for determining an appropriate deviation from the guidelines when the parties have not married or cohabitated and so have not established a lifestyle or standard of living against which the child’s reasonable needs can be assessed.

The approach selected by the Court of Appeals assumed that the lifestyle of the parent with the least resources would best represent the child’s reasonable needs. In fact that lifestyle has nothing to do with the child’s “needs” and everything to do with the limited ability of the financially disadvantaged parent to provide for the child’s needs. This approach runs contrary to existing case law and standards and has the practical effect of excusing the parent with the greatly superior income from any role or responsibility for establishing an appropriate lifestyle for the child. The decision would result in an unconscionable precedent for out of wedlock children who were never afforded an opportunity to enjoy the lifestyle (or even average financial stability) that should be expected when one parent is of substantial means.

The attempt by the Court of Appeals to impose the standard of proof developed to address circumstances where there was an established lifestyle upon a dissimilar set of facts (where the primary custodial parent had never benefited from a jointly established lifestyle) resulted in an evidentiary impossibility and a disservice to the child and primary caregiver. The lower court seeks to impose a standard of proof which has never been



required in similar circumstances. Credible evidence of anticipated costs/expenses is both relevant and admissible and should not have been disregarded.

### **ARGUMENT**

#### **I. THE STANDARD FOR ESTABLISHING INITIAL CHILD SUPPORT WHEN THE PARENTS HAVE NOT MARRIED OR COHABITATED AND ONE HAS INCOME IN EXCESS OF THE GUIDELINES SHOULD BE BASED ON EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO MAKE A FAIR AND REASONABLE ESTIMATE OF THE LIFESTYLE THE CHILD WOULD HAVE ENJOYED HAD THE PARTIES LIVED TOGETHER.**

Existing standards for the initial setting of child support which properly deviates from the child support guidelines are based on the “Income Shares” model which assesses the reasonable needs of the child in the context of a lifestyle established by contribution from both of the parents. The “Income Shares Model” is utilized in Kentucky to establish child support which is “based in the precept that the child should receive the same proportion of parental income that would have been received if the parents lived together.” *Schoenbachler v. Minyard*, 110 S.W.3d 776, 784 (Ky. 2003). “With the guidelines’ adoption, child support determinations shifted away from an expense-based process and toward an income-based process. Accordingly, the determination of child support under guidelines focuses the process on income of the parties.” *Minyard, supra*, at 784.

The Court of Appeals strained to apply this model to the initial setting of support when the parents had never cohabitated and so no contribution to the lifestyle had been made by one of the child’s parents. By removing the focus from BOTH parents the lower court suggests that the well-to-do parent be permitted to do what has been disallowed: the *Downing* Court made it clear that the Court should consider any factor

which affects the reasonable needs of the child and noted that “a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury.” *Downing, supra*, note 24.

Appellant respectfully requests this Court to assume that she and Kenneth (and any parents in similar circumstances) lived together for purposes of determining their child’s support. This approach would insure that consideration is given to what the child would have enjoyed from both parents and not just from her primary caregiver. *Minyard, supra*, at 784.

When parents have never lived together, the trial court cannot look to actual expenditures to review what the parents spent as a two-parent family such that the child’s standard of living could continue at that level. However, Kyra’s standard of living should not be a sole reflection of Rebekah’s meager lifestyle, but must also reflect Kenneth’s wealth and lifestyle. The adjustment in the analysis required because the parents had not established a joint lifestyle is presentation of proof which the trial court within its discretion judges to be acceptable as the basis of a determination of what the lifestyle would have been. The requirement which the Court of Appeals sought to impose, i.e., that only actual, out-of-pocket expenditures could form the basis of a determination, imposes a Catch-22 on the parent with scarce resources who will never have the ability to fund a reasonable lifestyle for the child without appropriate support; appropriate support will not be set until the primary custodian shows that money she does not have has been spent to establish a lifestyle.

In the underlying case, because Kenneth’s income alone exceeded the top of the guidelines by nearly \$100,000 per month exclusive of endorsement and other income, the

amount of support was firmly within the discretion of the Court and not limited to the maximum guideline amount. The trial court attempted to achieve the underlying precept in establishing an appropriate amount of child support: that a child should receive as child support the same proportion of parental income that he or she would have received had the parties lived together as an intact, two-parent family.

In making this determination, the trial court has “broad discretion in considering a parent’s assets and setting correspondingly appropriate child support.” *Downing, supra* at 454. Though the Court must exercise its discretion without relying on a mathematical extrapolated guideline table alone, consideration of the extrapolated guideline amount “may be a useful tool in determining an appropriate amount of child support.” *Id.* Under *Downing*, the court must instead set an award based on Kyra’s “reasonable needs” – a flexible test that takes into account the standard of living enjoyed by the children “during the marriage” and the parents’ financial ability to meet those needs. However, the “reasonable needs” of children whose parents were never married or enjoyed a lifestyle together that benefitted the children was not an issue for the *Downing* Court.

## **II. ACCEPTABLE EVIDENCE OF REASONABLY ANTICIPATED EXPENSES WAS PRESENTED AND IS AN APPROPRIATE BASIS FOR THE TRIAL COURT’S DECISION**

The Court of Appeals agreed with the trial court’s conclusion that deviation from the guidelines was proper because the “combined adjusted parental gross income exceeds the uppermost level of the guidelines table.” However, the lower appellate court reasoned that any decision to increase support above the guidelines must be based primarily on Kyra’s needs as set out in “specific supporting findings.” The Court



discounted testimony of the actual costs of living in the area where the parent seeking support resides as speculative unless the parent had actually managed to pay the expenses. The conundrum is obvious – without resources the parent could not establish an appropriate lifestyle, and without a showing of having actually achieved the lifestyle, the parent is unable to collect appropriate support. That standard has never been applied in any other context – a divorcing spouse seeking an award of maintenance can certainly offer evidence of anticipated expenses post-dissolution; an unemployed spouse may certainly offer evidence of costs of daily living that he or she has not yet paid because of the parent’s status as a homemaker and non-wage earner.

The Court of Appeals reasoned that basing an initial award of support on events that may never come to fruition is a “course we are unwilling to chart.” The Court noted the possibility that Kyra may become a basketball player and suggested that this doesn’t mean Respondent must build Kyra a training facility simply because he has the financial ability to do so. Comparing the evidence of reasonably priced safe housing and transportation and related expenses to such an extravagance is not rational. Appellant’s request for support was \$5000 per month and after an assessment of the evidence presented and the reasonableness of the basis of the request, the trial court made the adjustment to the \$4250 actually awarded.

The analysis proposed by the Court of Appeals begs the question of how a parent is to present non-speculative evidence of lifestyle expenses when the parent lacks the proper financial resources to cover the costs upfront. Until an award of reasonable support is made, evidence of the child’s interests, wants, and necessities will remain “speculative.” Appellant suggests that the likelihood that mother and child will acquire

appropriate housing and other necessities is nearly a certainty and the associated anticipated costs were established and formed the basis of the trial court's ultimate award.

The Supreme Court has analyzed the nature of evidence which would be required for a determination of issues which involve a degree of 'speculation':

In *Kellerman v. Dedman*, Ky., 411 S.W.2d 315 (1967), this Court quoted from the Wisconsin decision in *Essock v. Mawhinney*, 3 Wis.2d 258, 270, 88 N.W.2d 659, 664 (1958). It is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. **Under such circumstances all that can be required is that the evidence with such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of facts to make a fair and reasonable estimate and the plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.**

*Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 309 (Ky. 1993)(emphasis added). This same evidentiary principle translates easily to circumstances presented when parents have not lived together and jointly contributed to establishment of a lifestyle for their child. In this case Rebekah presented substantial evidence which the trial court judged to be sufficient to allow a decision as to the child's reasonable needs.

While the evidence presented was above the poverty level Rebekah herself was experiencing, the evidence was not of a lifestyle full of the extravagances enjoyed by the child's father. The evidence set forth by Rebekah merely placed Kyra in safe and decent housing with better educational opportunities than she might have otherwise had. Rebekah did not seek, nor did the trial court award, an amount of child support to equalize or "share the wealth" of Kenneth's lucrative and successful career. In fact,

Rebekah requested the trial court award \$5,000 per month in support based on her beliefs of Kyra's "reasonable needs." However, the trial court formulated its own budget for Kyra's "reasonable needs" and set the award amount at \$750 less than what Rebekah was requesting. The award of the trial court is well below what the guidelines would have allowed had they been carried out to that level of Appellee's income (reflective of the income shares approach), and is approximately 5% of Kenneth's gross monthly income.

Admissible evidence of Kyra's appropriate needs and expenses was offered at trial and accepted by the trial court. The trial court did not set support based on Respondent's ability to pay - the contrast between support of \$4,250 per month vs. Respondent's conservatively estimated \$125,000 monthly earnings cannot credibly be said to be based on Respondent's ability to pay. The trial court based the award on the evidence of what an appropriate lifestyle for Kyra would be. That finding was correct, is not an abuse of the discretion afforded the trial court in determining a deviation from the guidelines, and should be upheld.

**III. THE TRIAL COURT CORRECTLY HELD THAT  
THE FINAL DETERMINATION OF CHILD SUPPORT WOULD BE  
RETROACTIVE**

**THE ISSUE WAS NOT PRESERVED FOR  
APPEAL AND SHOULD NOT HAVE BEEN  
CONSIDERED BY THE COURT OF APPEALS**

"It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. *Combs v. Knott County Fiscal*



Court, Ky., 283 Ky. 456, 141 S.W.2d 859 (1940); CR 76.12 (4)(c)(iv) (1-1-85).” *Skaggs v. Assad*, 712 S.W.2d 947 (Ky. 1986).

A simple review of the record reveals that the issue of retroactivity of the final award of child support was not raised or preserved for appeal. At the time of issuance of the temporary order of support the trial court ruled that the final award, following full hearing, would be retroactive. That determination is in keeping with the governing statute, KRS 403.160. No challenge to that ruling was made during the proceedings or at trial, and when Rebekah’s counsel raised the issue at the conclusion of trial, Respondent’s counsel commented that such a decision was “within the trial court’s discretion.” That simple statement is not adequate to preserve the issue for appeal and the question was never raised in Respondent’s motion to alter, amend or vacate filed post-trial.

The Court of Appeals elected to consider the issue as if properly preserved and presented, and disagreed with the trial court, claiming that retroactivity “has created an untenable result of reimbursing [Rebekah] for expenses she has never incurred.” The lower appellate court is clearly mistaken. Retroactivity of a final order of support when a temporary order has been in place is governed by KRS 403.160, which provides that the final amount determined after a hearing **shall** be made retroactive to the date the petitioner filed a motion for temporary support. In this case in particular, retroactive enforcement is appropriate. Respondent was on notice that the award would be retroactive as the initial order specifically addressed this issue, and the lengthy delay from the time of the initial motion to final hearing was caused in significant part by Respondent’s basketball schedule and refusal to provide relevant financial information.

This finding appears to be a direct extension of the lower appellate court's erroneous conclusion that only actual out-of-pocket payments are relevant to issues relating to child support. "Child support" is not a direct reimbursement to the parent who has primary custody of a child for actual expenditures, as unreimbursed medical expenses may be. Followed to its logical conclusion, this holding would encourage the financially advantaged parent to delay and avoid for as long as possible the conduct of an evidentiary hearing for setting appropriate child support. Such a result could not be countenanced.

#### **IV. EXTRANEOUS MATTERS, ALSO NOT PRESERVED FOR APPEAL, SHOULD BE DISREGARDED**

Much of the discussion in the May 1, 2015 opinion from the Court of Appeals centers on issues not presented or preserved and irrelevant to the true focus of a child support deviation analysis—the needs of the child had the parents remained together. The Court explored the idea that because some years after the child's parents were no longer together and the mother lives with her boyfriend and their young son, Respondent's support will benefit persons other than the child of the parties. This discussion is irrelevant to a true analysis of child support deviation focused solely on the individual child. Further no proof on the issue was presented by Respondent at trial, nor elicited on cross examination at trial. The issue was first raised in Respondent's CR 59 motion filed post trial thus improperly seeking to "invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of a judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005).

Incidental benefit to others should not serve as a rational basis for failure to provide the parties' child with support sufficient for a lifestyle at least in keeping with what the parties would have provided if the parents had remained a couple. Had the

parents married and divorced, and the primary custodian remarried, that remarriage would not affect the award of child support. The obligated parent is not excused from his or her support obligation as a result of a new relationship for either parent.

**V. UNDER THE PROPER STANDARD OF REVIEW,  
AND BASED ON THE RECORD, THE COURT OF APPEALS  
ERRED IN DISTURBING THE TRIAL COURT'S RULING**

A trial court's award of child support is governed by the abuse of discretion standard. *Holland v. Holland*, 290 S.W.3d 671, 674 (Ky. App. 2009); *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). Discretion is abused only when a trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing*, *supra* at 454. The trial court's findings of fact may only be disturbed if they are clearly erroneous. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 513 (Ky. 1975). As stated in *Downing*:

Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any **deviation is adequately justified** in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Id.* at 454 (footnotes omitted).<sup>5</sup>

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<sup>5</sup> The Court of Appeals in its Opinion cites to the decision in *Downing* as requiring that "a child support determination that deviates from the guidelines must be based on the child's reasonable, documented needs. (Opinion, p. 14, emphasis added). No such requirement is imposed, and the actual requirement for 'adequate justification' is in keeping with the evidentiary standard which Appellant urges be adopted by this Court.



The Respondent does not dispute that a deviation from the support guidelines is warranted in this action; the basis for the deviation was detailed by the trial court based on evidence of expenses which should constitute the child's reasonable needs. The trial judge's decision was based on reasonable and relevant facts supported by sound legal principles. If evidence of the actual cost of living in the area where the parent and child reside is disallowed as "speculative" in all cases where the parent cannot independently pay those expenses, then no parent of poor or modest means will ever be able to offer proof of payment of expenses commensurate with the lifestyle the child would have enjoyed had the parents lived together and established a lifestyle. The trial judge did not abuse her discretion and the findings should be upheld.

### **CONCLUSION**

For the foregoing reasons, the Appellant requests the Court to overturn the May 1, 2015 Opinion of the Court of Appeals and reinstate the decision of the trial court and so establish a rational standard for assessment of a child's reasonable needs when one parent has income in excess of the guidelines and the parents have not established a joint lifestyle through marriage or cohabitation.

Respectfully Submitted,



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## **APPENDIX**